**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

SUIT NO. 323 OF 1974

C. N. Gandevia .. Plaintiff.

vs.

State Trading Corporation

of India. .. Defendant.

Mr. E. Fazalbhoy, Mr. K.K. Gandhi i/by

M/s. Mulla & Mulla CB & C

for the plaintiffs.

None for defendants.

Mr. S.K. Sarangi with Mr. N.K. Juneja

Chief Marketing Manager present.

**CORAM : S.U.KAMDAR, J.**

**DATE : 19th August, 2005.**

ORAL JUDGMENT :-

. The present suit has been filed for recovery of the sum of Rs. 4,00,311.79 with interest at the rate of 6% per annum. Some of the material facts of the present case briefly enumerated are as under :-

2. The plaintiff is carrying on business of clearing, forwarding and handling agent. The defendant no. 1 is State Trading Corporation of

India an canalising agency under the Exports and Import Policy and is carrying on the business of import and export. The defendant no. 1 appointed the original plaintiff as a clearing agent in respect of various items comprising fertilizers and chemicals, masoor dal, etc., This contract was for a perod of 1.4.1969 to 7.6.1971. The said contract was on the basis of various terms and conditions which are set out in an agreement executed by and between the parties dated 24.4.1969. Under the terms and conditions of the said agreement, the plaintiff was required to carry on the job of clearing, handling and forwarding of chemicals and fertilizers in bulk and transportation and warehousing of the same. The goods which were warehoused in drums, jars, bags, etc. containing chemicals and fertilizers. The said agreement was accepted by the original plaintiff.

3. Under the terms and conditions of the aforesaid agreement it was inter alia provided that the original plaintiff Cursetjee Nowroji Gandevia has ben appointed as clearing and handling agents for the consignment of packed/ in bulk chemicals/ fertilisers arriving from different countries at Bombay Port for the period ending 31st March 1970. Under the terms and conditions of the said agreement it was the liability of the original plaintiff to carry out all the work of clearing, forwarding and

handling and transportation thereof and warehousing and storage thereof. Under clause (f) of the said agreement, it was provided that the plaintiff will make available their godowns for storing packed bulk chemicals/fertiliers as and when required by the defendant. The rate in respect of the charges are also stipulated being rate per bulk 0.57 paise per metric tons and in respect of importing in cases, drums, jars, bags, etc., it will be Rs. 1/- per metric tone. The said charges are specifically stipulated and various other charges such as handling charges, etc., were also payable. Under clause III it was provided that payment will be made by the Corporation against bills submitted by the original plaintiff along with original delivery challans after scrutinizing and after deducting all claims which are not in accordance with agreement.

4. It is the case of the plaintiff that upto the period of 31.3.1970, the agreement continued and the same agreement has expired on that date. It is further case of the plaintiff that after expiry of the aforesaid agreement on 31.3.1970, the defendant no. 1 continued the contract with the original plaintiff on the same terms and conditions for the subsequent period upto 6.7.1971 when the final bills were submitted by the original plaintiff to the defendant no. 1. It is the case of the plaintiffs that continuation of the contract beyond the period

of 31.3.1970 was also on the very same terms and conditions. It is therefore the case of the plaintiffs that the plaintiffs acted as handling agent upto 7.6.1971 and have forwarded bills for the sum of Rs. 4,09,363.37 being Exhibit "A" to the plaint. It is further case of the plaintiff that the said bills contained particulars of charges which the original plaintiff have become entitled to recover in respect of the said contract of chemicals and fertilizers as also in respect of various food-grains such as masoor dal, basmati rice, soya oil, etc. In spite of forwarding the aforesaid bills Exhibit "A" to the plaint, the plaintiff did not make payment. According tot he plaintiff the defendants had admitted the claim by their letter dated 16.11.1971 and kept on assuring to the plaintiff that they will make the payment of the amount. However, inspite of correspondence and advocate’s notice, the defendants have not paid the aforesaid amount. It is the case of the plaintiff that on 7.1.1973 there was a meeting by and between the representative of the original plaintiff Mr. Master and Mr. K.N. Bali on behalf of defendant no. 1 where once again the said Mr. Bali gave assurance to the plaintiff that he will settle the account after scrutinizing the same. However, in spite of the said assurance, no payment was forthcoming and, therefore, the plaintiff has filed the present suit for recovery of the said amount

along with interest at the rate of 6% per annum on the aforesaid dues.

5. The defendant has filed written statement and admitted that there was an agreement of 24.4.1969 entered into by and between the plaintiff and the defendants. However, it has been contended that the said agreement was only upto 31.4.1970 and was never continued till 7.6.1971. The defendant denied that after 30.4.1970 the plaintiff was continued as an agent in respect of the said claim. It has been pointed out in paragraph 9 of the written statement that in fact on 16.6.1970 there was a fire in the godown of the 1st defendant and all the goods were burnt and they are destroyed. It is, therefore, contended that in view of the aforesaid position, the claim of the plaintiff of godown charges subsequent to 16.6.1970 right upto the submission of the bill dated 7.6.1971 is totally unsustainable because once the goods having been burnt and destroyed in fire, there cannot be any godown charges for warehouse the goods. It has been further contended that the said fire is attributed to the plaintiff's negligence to take proper care of the goods and consequently the defendant has lost their goods in the custody of the plaintiff herein. In view of the aforesaid position, it has ben contended that the suit filed by the plaintiff is baseless and without merit and the same is liable to

be dismissed.

6. On the aforesaid pleadings, the issues were framed on 10.7.2002. The said issues are as under :-

1. Whether the plaintiffs' suit is barred by the law of limitation?

2. Whether the plaintiffs are entitled to claim their amounts in the suit or any part thereof in respect of the suit transactions?

3. What order ?

4. Generally.

7. By an order dated 17.7.2002 made by Justice K.K. Baam, a retired Judge of the City Civil Court Mr. S.F. Rego, was appointed as a Commissioner to record evidence. It was directed in the said order that it should be expeditiously completed and in any event within a period of three months. This order dated 17.7.2002 was accordingly communicated by the parties to the said Commissioner on 27.8.2002. On 2.11.2002 in a meeting held, various

directions were given by the Commissioner for recording evidence. The evidence was accordingly recorded on 7.4.2003, 8.4.2003 and 9.4.2003. Cross-examination of the plaintiffs' witness was partly conducted by the defendant and further cross was fixed on 20.4.2003. It was directed that on completion of the cross-examination the matter will be heard on 16.6.2003 i.e. after the Summer Vacation and that further cross-examination was conducted on 27.7.2003 and 25.8.2003 and the matter was thereafter adjourned to 15.9.2003 when the plaintiff concluded his evidence. The matter was thereafter not proceeded from 15.9.2003 onwards as the defendant did not produce their witness before the Commissioner for recording evidence. Thus for almost two years there was no progress before the Commissoner for recording evidence because of non-co-operation on the part of the defendants. The matter was therefore placed on board on 8.6.2005 before me when I gave a fresh direction to the Commissioner to complete recording of evidence and file a report by 30.6.2005. On 29.6.2005, the defendant submitted an application before the Commissioner for time to examine his witness one Mr. S. K. Sarangi, General Manager of the defendants and it has been contended that he was out of station and, therefore, a fresh direction should be given. Thereafter the Commissioner directed the parties to appear before the Court and

apply for further direction. However, nothing happened thereafter. The matter was thereafter listed before me for hearing on 19.7.2005. Even before me no witness was produced by the defendant. Surprisingly, no advocate also appeared on behalf of the defendant. It is regretted that though the Commissioner was appointed under the orders dated 17.7.2002 passed by this Court with the direction to complete evidence within a period of three months but even after three years, the evidence could not be completed. The only and sole reason is total non-cooperation on the part of the defendant in producing the witness before the Commissioner. Even on 19.7.2005 when I heard the matter, the defendant was not ready. On the said date the matter was adjourned because the report of the Commissioner was not filed. However, no advocate appeared for the defendant. One Mr. N.K. Juneja, Chief Marketing Manager appeared in person and sought for adjournment. Even on 19.7.2005 no witness was produced. The matter was adjourned to 20.7.2005. On 20.7.2005 also neither the advocate appeared on behalf of the defendant nor any witnesses were produced for the purpose of recording evidence. I find the acts on the part of the defendant most negligent and pathetic. The officers of the defendant company are the espanding all tax prayers money and they are prosecuting this litigation in the most unsatisfactory manner. It

is also important to note that the defendants are not at all serious in conducting the litigation which is being filed against them in the present case. I also find similar position even in the cases instituted by the other public sector undertakings or the government undertakings. The act on the part of the government undertakings in matters after matters pertaining to the banks, insurance or State Trading Corporations or other canalising agencies have not been prosecuting the litigation and simply apply for adjournment after adjournments on one pretext or the other. The advocates are changed at the last minute or advocates are not available or record is not traceable or that simply none remains present. It is unfortunate that the persons who are dealing with public money can be permitted to have such a pathetic approach to the court proceedings where in cases after cases huge amounts of money is involved. I also find that this is one of the reason for huge backlog particularly because large part of litigation pertains to these organisations. In the aforesaid circumstances, I refused to give any further adjournments in the matter. The object of introducing section 26 rule 4 in the Civil Procedure Code for recording evidence by the Commissioner is for expeditious disposal of the cases but the present case is one of the glaring example where the provisions are straight fastly

defeated by the conduct of the authorities in the present case, a public sector undertaking. Three years after the Commissioner has been appointed, except cross-examination of two witnesses no further evidence has ben recorded in the case. After even giving extension, the defendant even did not produce the witness before the Commissioner and went on applying for adjournments. Even before me they did not produce the witness but once again applied for adjournment. In the aforesaid circumstances, I find that the present case is a serious case where serious action is necessary so as to send the message home that the officers of the Government and the Government Undertakings cannot take the legal proceedings so lightly merely because they are not personally affected at all by the out-come of the litigation or by virtue of the Court proceedings being unduly delayed. It is far cry in this case that this litigation should be disposed of. The present suit is a glaring example. The suit is of 1974. We are in 2005 thus 31 years have passed from the institution of the present suit for a meagre amount of claim of Rs. 4 lacs. The Court is not able to dispose of the same partly because of the consistent attitude on the part of the defendants in not conducting the litigation diligently. In the aforesaid premises, I have proceeded with the matter without giving any adjournment. Mr. N.K. Juneja Chief Marketing

Manager has appeared in person on behalf of the defendant. I have heard him in person and I accordingly proceed to decide the present suit. In view of my observation as above, it is necessary that the present judgment be placed before the Chief Secretary, Ministry of Commerce, New Delhi, Chief Secretary of the Ministry of Finance, New Delhi and the Chief Secretary, Law and Judiciary, New Delhi, for taking necessary and appropriate action.

8. Even on merits of the case, the claim of the plaintiff as evident from the evidence both documentary evidence and oral evidence, is in two parts. One is towards transportation charges and secondly towards warehousing charges.

9. From the documents which are produced particularly Exhibit "E" , the details of the bills have been set out. From the details of the bills, I find that Rs. 1,42,552.67 is claimed under various bills towards the transportation charges. Whereas the sum of Rs. 2,66,810.70 has been claimed towards the godown rent for a period from June 1971 onwards under the three bills bearing nos. 71/G-51A, 71/G-52A, 71/G-53A. Thus, the total claim both comprising of the transportation charges and godown rent comes to Rs. 4,09,363.37.

10. In support of the aforesaid claims, the plaintiff has relied upon various copies of bill of entries. These bill of entries admittedly pertain only to the claim of transportation charges. The said bills of entries are relied upon as Exhibit "D" collectively. Thereafter the plaintiffs have relied upon the correspondence which has been exchanged by and between the parties pertaining to the said claim. The plaintiff has also led oral evidence of one Mr. Eruch D. Master who has deposed that the plaintiffs were appointed under an agreement as forwarding agent in respect of chemicals and fertilizers and that the said agreement was executed on 24.4.1969. It has also been deposed that in respect of the said work carried out from time to time the plaintiff has issued bills to the defendant and the receipt thereof has been acknowledged by the defendant. It has been also deposed that apart from the fact that the bills which are the subject matter of the present suit, other bills are also paid by the defendant. In para. 8 of the affidavit in chief it has been admitted that the godown rent charges were raised under three bills all dated 7.6.1971 and that pertains to the period subsequent to the fire which took place in the godown. It has also been admitted in para. 8 of the said affidavit that the goods which were stored on 16.6.1970 were destroyed. However, it is the case of the

plaintiff in the examination-in-chief that though the said goods were destroyed but the salvage was not removed and the defendant directed the plaintiff not to touch the same because of the pending insurance claim with the insurance company. Thus according to him the plaintiff is entitled to godown rent even in respect of the salvage material because the space of the godown was occupied. The witness of the plaintiff was cross-examined before the Commissioner In the cross-examination, the plaintiff has stated that the plaintiff is conversant with the facts of the case since he has attended the transaction in the present case. He deposed that one of the officer Mr. Madan of the defendant advised the plaintiff not to touch salvage goods till such time as the insurance claim is settled. He has also deposed that he does not have any written confirmation from the defendant in respect of the retention of the salvage goods. He has denied the suggestion that the said fire broke out because of the negligence of the plaintiff. He has deposed that the fire broke out because there was a water logging and because of the Sewri area was flooded with rain water. He has stated that ultimately the salvage material was sold by the insurance company. In further cross-examination on the next occasion once again he has pleaded such as oral arrangement of storing salvage material in the godown. When he was examined whether he has paid

the rent of the godown to the lessor he has deposed that he does not have any details to furnish. He has deposed that when the fire broke out the roof of the godown was blown up but walls and the floor was intact. In support thereof he has relied upon the newspaper cutting of 17.6.1970. He has further deposed that the chemical while coming into contact with water has resulted in explosion. In so far as transportation charges and the bills are concerned, there is no cross-examination at all of the witness by the defendant. Essentially the cross-examination has been restricted to the godown rent charges claimed by the plaintiff herein.

11. After the conclusion of the evidence as mentioned hereinabove, the defendant did not cooperate with the the Commissioner nor did produce any witness before him for establishing their case. In the aforesaid circumstances, the claim of the plaintiff in so far as the transportation charges are concerned, has gone unchallenged. There is no cross-examination at all of the documentary evidence or the oral evidence pertaining to the said bills of transportation which is amounting to Rs. 1,42,552.67.

12. However, there is a serious dispute about the payment of the warehousing charges. The learned counsel for the plaintiff has contended

that the plaintiff is entitled to the warehousing charges firstly because even if the goods were destroyed in fire but since the salvage material was not removed from the said godown premises, the plaintiffs are entitled to the said charges. He has contended that the occupation of the godown by the defendant subsequently also attracts liability of payment of godown rent by the defendant and they cannot escape the aforesaid liability. It has been contended that if the said salvage would have been removed the plaintiff would have been in a position to let out the said godown to some other person and use the same for storage of the goods of third parties and would have earned money. But in the absence of removal of salvage the said godown space could not be utilised and thus the plaintiffs are entitled to godown rent even for the period subsequent to the fire. In support of the aforesaid contention, the learned counsel for the plaintiff has relied upon the authorities to contend that irrespective of the fire the liability to pay rent does not cease to exist. The learned counsel has relied upon the judgment in the case of Bruel & Co. vs. Haji Sidick Haji Ibramhim, reported in 1910 Vol. XII, Bombay Law Reporter 474 and has also relied upon a judgment of the Calcutta High Court in the case of Jiwanlal & Co. & Ors. vs. Manot & Co. Ltd., reported in 64 Calcutta Weekly Notes page 932. It has been contended by

relying upon the aforesaid judgements that even after the fire the agreement between the plaintiff and the defendant to store and warehouse the goods continues and the plaintiff is entitled to godown rent. In my opinion, the aforesaid two judgments cited by the learned counsel have no relevance to the present case. In those two judgments there was no provision for storing or warehousing the goods but the godown itself was let out by creating a tenancy in favour of the third party. Thus, the contention was that even after the fire if the plaintiff wants to continue his tenancy and claim the rights under the tenancy then he must pay the rent because the demolition of the entire building would not by ipso facto determine the lease because the lease is the interest created in the land. Once there is a tenancy of the ground then such tenancy cannot be extinguished by virtue of fire or any other calamity because interest is not created merely in the structure but is also created in the ground. However, we are not dealing with any such case of tenancy. Exhibit "C" which has been produced before me in evidence does not create any tenancy in respect of the property at all. It only appoints the plaintiff as the clearing and handling agents and the agreement executed between the parties in respect thereof provides as under :-

"5. If required, the Handling Agents are required to make the storage arrangements for storing such cargo either in bags or in closed pakka godowns or in open space as may be required, charges payable for the same will be as under :

| | |
|---|---|
| a) For the cargo to be stored in closed pakka godown | Rs.1.50 P per M/T per week or Rs.6.25 P per M/T per month. |
| b) For the cargo to be stored in open yard but with proper walls and guarding against pilferage etc. | Rs.0.50 per M/T per week or Rs.2/- per M/T per month." |

"V Godowns:
If asked for by the Corporation, the goods shall be stored by the Handling Agents in well-built bearing pukka flooring and completely free from white ants menace. The godowns shall have to be previously approved by the Corporation and the goods shall be properly stocked as per the instructions of the Corporation. No extra charges will be paid for proper stacking of the goods in their godown."

On a true reading of the said agreement dated 24.4.1969 being Exhibit "C" in the evidence, it is not possible to hold that such an agreement has created any tenancy in respect of the godown in favour of the defendant. In my opinion, the agreement is merely for storage and warehousing of the goods. Admittedly the goods are destroyed in fire and the godown has become unusable for storage ofk the goods. Once such an event has intervened then in that event the said agreement dated 24.4.1969 being Exhibit "C" in the evidence automatically comes to an end and stands frustrated by supervening events. The provisions of section 56 inter alia contemplate that if the contract, in view of a particular act occurring after the contract is made, becomes impossible or by reason of some event which the promisor could not prevent becomes void then the said contract comes to an end. The provisions of the said section contemplates a case where the contract has become impossible to perform. In the present case Exhibit "C" to store the goods in warehouse in discharge of duty of handling and forwarding agent has become impossible to perform once the fire broke out and goods were destroyed. In my opinion, thus under Section 56 of the Contract Act, the said contract cannot be performed and stood frustrated and has become void. In view thereof, it is not permissible for the plaintiff to claim the amount

for storage and the godown rent subsequent to the event of fire. Admittedly the entire claim of godown rent is for subsequent period. The provisions of Section 56 of the Contract Act then in that event are attracted because the said contract for warehousing the goods has stood frustrated by happening of an unnatural event which is a fire in the present case. With said fire the goods are destroyed as well as the space for storing is also destroyed. The contention of the learned counsel for the plaintiff that because salvage was kept in the said godown they are entitled to godown rent is required to be rejected. Firstly there was no contract between the parties to store the salvage. Secondly, if the goods are destroyed in the godown the contract having come to an end, the right to recover godown rent also ceased to have effect from the date of the said fire. In view of the aforesaid, it is not possible to hold that the defendants are liable to pay the godown rent because salvage or the burnt goods were lying for the purpose of insurance formalities. In any event, there was no contract between the parties to store such salvage material. The contention of the learned counsel for the plaintiff relying upon the aforesaid judgment which is in respect of the creation of tenancy has no application whatsoever in the present case and I, therefore, do not accept the same. In the

aforesaid view of the matter, I am of the opinion that the plaintiff is not entitled to any godown rent charges for the period subsequent to the said fire.

13. In the aforesaid circumstances, I pass the following decree.

> That there shall be a decree in favour of the plaintiff and against the defendants for a sum of Rs. 1,61,402.80 with interest thereon at the rate of 6% per annum from the date of the suit till payment and/or realisation. The claim of the plaintiff in so far as godown rent is concerned, is dismissed.
>
> In view of the fact that the conduct of the defendant has been far from satisfactory in the present case, it is necessary that the defendant must be saddled with costs of the present litigation. Accordingly, I direct the defendant to pay the cost of the present litigation quantified at Rs. 15,000/- and the defendant will be at liberty to recover the same from the concerned officers who are found negligent

in the present case in accordance with law.